Nos. 458 & 459

Court of Claims

In the Supreme Court of the United States.

October Term, 1900.

| | |
|---|---|
| George T. Myerrose, as executor, etc., of Jane H. Sherman, deceased, Plaintiff in error, v. John G. Ware, Collector, etc., Defendant in error. | No. 458. |
| George D. Sherman, Plaintiff in error, v. The United States, Defendant in error. | No. 459. |

**Brief for Plaintiffs in Error under rule of the Court of February 23, 1900.**

CHARLES E. PATTERSON,
*Of Counsel.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1899.

---

| | |
|---|---|
| GEORGE T. MURDOCK, as executor, etc., Plaintiff in error, *v.* JOHN G. WARD, Collector, etc., Defendant in error. | No. 458. |
| GEORGE D. SHERMAN, Plaintiff in error, *v.* THE UNITED STATES, Defendant in error. | No. 459. |

---

## ERRATUM.

**Correction of Brief for plaintiffs in error filed under rule of the Court of February 26, 1900.**

By a mistake of the printer in putting together the matter of this brief, what appears as page 9 should be read as page 8 and what appears as page 8 should be read as page 9.

CHARLES E. PATTERSON,
*of Counsel.*

IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

OCTOBER TERM, 1899.

| | |
|---|---|
| GEORGE T. MURDOCK, as executor of Jane H. Sherman, deceased, Plaintiff in error, *against* JOHN G. WARD,, United States Collector of Internal Revenue. | No. 458. |
| GEORGE D. SHERMAN, Plaintiff in error, *against* THE UNITED STATES. | No. 459. |

**BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR, UNDER ORDER OF THE COURT MADE THE 26TH DAY OF FEBRUARY, 1900.**

**(The Court has called for further briefs "on the construction of the act under consideration in respect of the question whether the tax or duty imposed on each of the legacies is measured by the volume of the estate or the amount of the legacy.")**

Upon the argument of these cases in court, the counsel taking part therein, both for plaintiffs in error, and for the government, were agreed in their construction of the statute in question, that the tax or duty imposed upon each legacy, or upon the amount received by each legatee, is measured by the volume of the estate, and not by the amount of the legacy. If there shall obtain a different construction, all the taxes imposed in the cases now before the court have been improperly assessed, and all the actions have been well brought, even though the constitutionality of the law in question shall be upheld. The result may be that the plaintiffs will not have the full relief sought, but must be awarded a modified relief.

It does not seem possible that there can be any other construction given to the statute, than the one recognized by the Commissioner of Internal Revenue, and heretofore conceded by all the counsel to be its true construction.

While it is the duty of the Court to construe doubtful language in a statute, so that the construction will not work mischief or injustice, it is not the duty of the Court to revise and rewrite statutes and to substitute constitutionally just and harmonious laws in the place of those enacted by the Congress, which are plainly unconstitutional, and whose injustice is, beyond question, the result of the deliberate intent of the Congress. Otherwise, this Court will usurp the prerogative of the Congress, and while the remedial result will be effected of removing unconstitutional features from a statute, by amendments written in by the Court, the functions of the law-making power will be infringed upon, and in effect taken away by the law-construing branch of the government.

In *Doe, Lessee of Poor,* v. *Considine,* 6 Wallace, 458,

in the opinion of the Court, *per* Mr. Justice Swayne, there occurs this, which expresses the position of counsel: "Were we to adopt the construction claimed by the plain-"tiff's counsel, instead of adjudicating we should legis-"late. This we have no power to do. Our function is "to execute the law, not to make it." Perhaps the word "execute," as here used, may be subject to some criticism or modification, for the Court *construes* the law, and *executes* it only when its process is required for that purpose.

It is not necessary in this case to carry well recognized rules to any extreme. The language of the statute in question seems to be so clear and so unmistakable, that any injustice that may result from imposing a tax upon a legacy proportioned the value of the estate of the testator, instead of proportioned to the amount of the legacy, is so apparent, that there can be no doubt that the Congress intended just exactly what the President approved of, and that is the injustice that is now complained of.

In the construction of statutes, undoubtedly the intent of the law-making power is first to be sought, and the efforts of the Court should be directed towards giving effect to that intention. "But a necessary qualification "has been annexed to that proposition; that the inten-"tion, to which such effect is to be given, must be such "an intention and object *as the Legislature have used "fit words to express."*

Potter's Dwarris on Statutes, 192.

It is not a rule for the construction of statutes, as appears to have been contended for by the learned Solicitor General in his main argument, that because Congress could never have intended to pass an act void and inoperative on its face, therefore an unconstitutional or inoperative act of Congress must be rewritten by the Court in such language as will make it operative. The

language of the learned Solicitor General is this (pp. 30, 31, of original brief):

"The practical operation of the statute—the real na-"ture of the exaction—is what the court will look to in "determining whether the tax is direct or not. Is it not "absurd to jump to the conclusion that Congress would "do a wholly futile thing by levying an unapportioned "tax upon personal property? Certainly Congress "never intended to pass an act void and inoperative on "its face. It was the design of Congress to pass a valid "law, to pay a tax in accordance with the constitution. "This it could do by taxing the privilege of transmit-"ting the property; it could not do so by taxing the "property itself."

In so far as the intent of the legislative body is subject of consideration in the interpretation of its acts, that intent must be ascertained from the language of the statute itself. If the language of the statute is of doubtful import, aid may be given to its construction by a consideration of the circumstances under which the enactment was made.

Now in this case, we have as part of the surrounding circumstances, one fact which is recognized in the title of the statute under consideration. The title is "An "Act to provide ways and means to meet war expendi-"tures, and for other purposes."

It is a matter of history, and is made matter of record by the statute itself, that at the time of this enactment a necessity was imposed upon the government of the United States to provide an extraordinary revenue to meet extraordinary expenditures, by reason of pending warfare. It may not be matter of official record, but it is a matter of current history, and a matter of which this Court cannot fail to take cognizance, that at the time this statute was enacted, there was a great popular—or if not popular, at least populistic—outcry

against taxation being imposed so as to fall heavily upon persons possessed of small means, and exempting large estates from taxation.

For the present, without laying special stress upon the language of the statute, it is not too much to ask the Court to consider, that Congress, in enacting the statute in question, had intended to accomplish these two objects: (a) Raising of war revenue; (b) the imposing of the heavy burden of taxation for the purpose of the war revenue upon large estates.

Assuming the law in question to be constitutional, it was admirably adapted to accomplish the intent of the legislative body. The Court cannot ignore the fact that under the provisions of this act, even outside of sections 29 and 30, now under consideration, an enormous revenue has been raised for the purposes of the government, and sufficient to meet all of its extraordinary expenditures for purposes of warfare. The intent of the Congress to tax rich estates to the exemption of small ones, is clearly and unmistakably expressed in the language of the act now under consideration. Indeed, the language seems so clear, and so explicit, that it is almost impossible to reach any conclusion other than that it was the intent of Congress to impose the tax under consideration, with reference to the volume of the estate regardless of the amount of the legacies that might pass.

The construction that has been given to this statute by the Commissioner of Internal Revenue is in perfect harmony with the language of the statute, and has been recognized by every department of the government, and was recognized by all the counsel who took part in the argument of these cases.

Undoubtedly the Court has reached, or may reach, the same conclusion that counsel have, that the statute in this respect is unconscionable, unreasonable and unjust, and if these are sufficient reasons for a decision in favor of

the plaintiffs in error, the Court must also reach the conclusion that the statute is unconstitutional.

Although these may not, of themselves, be sufficient reasons for an adjudication that the law is unconstitutional, they are pertinent matters for the Court to consider in determining whether the law does not violate the *spirit* of the constitution, which seeks uniformity and equality of taxation, and therefore aid in determining a true constructon of the *letter* of the constitution.

While the Court ought, in the harmonious workings of its separate department, in connection with the executive and legislative departments of the government, to seek to sustain those departments in all their acts and enactments, and while it should strain in every reasonable way to uphold an enactment of the Congress as constitutional, yet where the enactment is clearly unconstitutional, this Court is not called upon to violate its conscience, or to rewrite statutes, so as to make them what the Congress might have constitutionally provided.

To come now to a critical examination of the language of the statute in question. Section 29 says: "Any per-"son or persons having in charge or trust, as administra-"tors, executors or trustees, any legacies or distributive "shares *arising from personal property, where the "whole amount of* SUCH PERSONAL PROPERTY AS AFORE-"SAID, shall exceed the sum of ten thousand dollars in "actual value, passing, after the passage of this act, "from any person possessed of such property, either by "will or by the intestate laws of any State or territory "* * * to any person or persons, or to any body or "bodies, political or corporate, in trust or otherwise, shall "be, and hereby are, made subject to a duty or tax, to "be paid to the United States, as follows, that is to say: "*Where the whole amount of said personal property* "shall exceed in value ten thousand and shall not exceed

"in value the sum of twenty-five thousand dollars, the "tax shall be:

"First. Where the person or persons entitled to any "beneficial interest in said property shall be the lineal "issue or lineal ancestor, brother, or sister, to the person "who died possessed of such property, as aforesaid, at "the rate of seventy-five cents for each and every hundred "dollars of the clear value of such interest in such prop- "erty."

Then the act goes on to provide in the second, third, fourth and fifth subdivisions, for a different rate of taxation, according to the remoteness of the relationship of the person entitled to receive such beneficial interest, or in accordance with the lack of kinship of the recipient of the property to the deceased.

Then a further provision follows, that "where the "amount or value of *said property* shall exceed the sum "of twenty-five thousand dollars, but not exceed the sum "or value of one hundred thousand dollars, the rates of "*duty* or *tax* above set forth shall be multiplied by one "and one-half," and so the rate goes on increasing, until "where the amount or value of SAID PROPERTY shall "exceed the sum of one million dollars, such rates of "duty shall be multiplied by three."

If this Court is bound by any rules of grammar, in its construction of statutes, it is not possible so to construe this statute, as to find otherwise than that the tax here imposed is proportioned to the value of the property which passes from a testator to an administrator, executor or trustee. No other possible construction can satisfy rules of grammar. If the courts shall hold that there was a legislative intent to make the tax to be measured by the amount of the legacy, instead of by the amount of the estate of the tesator, such intent is not manifested in anything which the Congress has said. If this Court shall say that it would have been constitutional for the

tion of this law, upon an equality with all the multi-millionaires of the country. Persons with less than a million dollars are commiserated and pitied in accordance with the smallness of their means, so that if a party has not more than ten thousand dollars at the time of his death, his estate will escape government taxation.

Supposing the contention should prevail that the tax imposed by this statute is measured by the amount of the legacy, and not by the amount of the estate of the decedent, any party owning upwards of ten thousand dollars at the time of his death may provide a means of escape for his estate from the payment of any tax whatever under this statute, and yet give all his property to a single legatee or beneficiary. Whatever the amount of the estate, he may create separate trustees for each $9,999 thereof, anad give each separate parcel of his estate to the amount of $9,999 thereof, to a separate trustee, for the benefit of one particular beneficiary.

If the tax be imposed upon the particular legacy, or upon the trustee with reference to the legacy which the particular trustee has, and is not imposed upon the bulk of the estate, the estate of a millionaire may be as free from this government tax as the estate of one not worth more than ten thousand dollars.

It is not probable that the members of the House of Representatives, and of the Senate of the United States, who voted for this particular enactment, fully considered the effect of their votes, or thoroughly understood the consequences of their action. If so, it is doubtful whether they would have said that the Saratoga Hospital must pay $750 to the government for receiving a legacy of $5,000 from Mrs. Sherman, merely because she was worth more than $1,000,000, while if she had not been worth more than $10,000 the Hospital might have received that same legacy without paying a cent of tax.

It is certain, however, that the legislative intent was

Congress to have passed a statute imposing a tax upon legacies varying in amount according to the amount of the legacy, and varying in amount according to the degree of kinship, or because of lack of kinship of the beneficiary to an intestate, it may be reasonably said that no such question has been before this court.

If the Justices of this Court shall be of opinion that such a law would be constitutional, it is not within the province of this Court to enact such a law. To say that this law means what it has not said, and to say that there shall be a tax imposed upon legacies according to the amount of the legacy, and according to the degree of kinship, or lack of kinship, will be for this Court to arrogate to itself legislative powers, and to impose a tax which the Congress in its tax-making power has not imposed.

It will be a travesty upon justice, if this Court shall adopt the line of reasoning of the learned Solicitor General, and say that Congress could not be assumed to intend to pass an unconstitutional or inoperative law, and therefore this Court will modify or remake the law which was enacted by the Congress, and substitute for what is unconstitutional a law that shall be constitutional.

In saying this it is not intended to concede, and it is not conceded that the law would be constitutional, even if it apportioned the tax according to the amount of the legacy, and not according to the volume of the estate.

To put a construction upon the statute, that the tax is to be proportioned to the amount of the legacy, and not to the volume of the estate, would subvert entirely the intent of the Congress. Nothing can be clearer from the language of the statute, than that it was intended to make a distinction against large estates, and to impose a heavy tax upon those who should die rich. The line of demarcation is drawn at millionaires. A man worth a million dollars at the time of his death is, in contempla-

expressed in the language which it used, and because Mrs. Sherman was worth more than a million dollars at the time of her death, it was the intent of the Legislature that the Saratoga Hospital should pay $750 to help carry on the wars of the United States. The injustice and unreasonableness of the enactment are not sufficient grounds for the Court to reverse the action of the Revenue Department in collecting this tax, but they are subjects worthy of the consideration of this Court, in determining the question whether the Constitution is so framed as to permit such injustice to be done.

In the record in the Sherman case, there is incorporated a transcript of the assessment sheet, by which the government imposed its tax upon the Sherman estate. This sheet was prepared in the office of the Commissioner of Internal Revenue, and undoubtedly was advised by the law advisers of the government. It seems to be strictly in accordance with the detailed provisions of the statute in question. By reason of the assessment made upon that sheet, a tax has been imposed upon the different legatees under Mrs. Sherman's will, the rate of which has been determined by the value of the whole of Mrs. Sherman's estate, and not by the amount of legacies given to the different legatees. If a contrary contention should prevail, and it should be held that the tax should have been apportioned according to the value of each legacy, and the degree of kinship of the legatee, sufficient ground is afforded for a reversal of the judgment, even though this Court should hold the law to be constitutional.

At the same time, for the reasons stated upon the argument of this case, and in the briefs heretofore filed, it is contended that the whole law is unconstitutional, even though this Court should construe the statute differently from what it has ever heretofore been construed.

While there may be no cases decided by this Court,

involving this direct question, and which may aid the Court in a construction of this statute, the attention of the Court is called to the case of *Matter of Hoffman* (143 N. Y. 327), in which almost the identical case was decided under a transfer act of the State of New York. (Chap. 399, Laws of 1892.) It is probable because of the decision in this case of Hoffman, that the act of 1892 has been revised.

The language of that statute is not as explicit as in this case, that the value of the whole estate was the determining question in affixing a tax.

The Court of Appeals of the State of New York held that, under that statute, the limitation applied to the aggregate value of all property transferred, and not to the separate value of each several transfer.

There is a similar decision under the same statute, *"In the Matter of the Estate of Samuel Hall, deceased"* (88 Hun, 68), and in which the syllabus is:

"The transfer tax, created by chapter 399 of the Laws "of 1892, is imposed by the terms of the act upon the "aggregate of the property which descends from the de- "cedent, and not upon the separate parcels or shares into "which it may be divided:

"A share less in amount than $500 is taxable under "the act, if all property of the deceased was of the value "of $500 or over."

These cases may not be regarded as authority by this Court, but they seem to throw some light upon the construction contended for. They are in the line of the claim that is now made, and, it is believed, add some strength to a position that, even without their aid, would be regarded as impregnable.

There are authorities in this Court which bear upon the question of the construction of statutes, and are pertinent to the present inquiry.

In *Ruggles* v. *Illinois* (108 U. S.. 526), at page 534,

in the opinion of Mr. Chief Justice Waite, reference is made to a general maxim of interpretation applied to the construction of a statute, which is as follows:

"But Vattel's first general maxim of interpretation "is that *'it is not allowable to interpret what has no need* " *'of interpretation,'* and he continues: 'When a deed " 'is worded in clear and precise terms—when its mean- " 'ing is evident and leads to no absurd conclusion— " 'there can be no reason for refusing to admit the mean- " 'ing which such deed naturally presents. To go else- " 'where in search of conjectures, in order to restrict " 'or extend it, is but to elude it.' Vattel's Law of Na- "tions, 244. Here the words are plain and interpret "themselves."

In *Aldridge* v. *Williams* (3 How. [U. S.] p. 24), the language of Mr. Chief Justice Taney is as follows:

"The law, as it passed, is the will of the majority of "both houses, and the only mode in which that will is "spoken is in the act itself; *and we must gather their "intention from the language there used,* comparing it, "when any ambiguity exists, with the laws upon the "same subject, and looking, if necessary, to the public "history of the times in which it was passed."

In *Lake County* v. *Rollins* (130 U. S. 662), the Court, by Mr. Justice Lamar, made use of this language:

"We are unable to adopt the constructive interpola- "tions ingeniously offered by counsel for defendant in "error. Why not assume that the framers of the consti- "tution, and the people who voted it into existence, meant "exactly what it says? At the first glance, its reading "produces no impression of doubt as to the meaning. It "seems all sufficiently plain; and in such case there is "a well settled rule which we must observe. The object "of construction, applied to a constitution, is to give ef- "fect to the intent of its framers, and of the people in

"adopting it. This intent is to be found in the instru-
"ment itself; anad when the text of a constitutional pro-
"vision is not ambiguous, the courts, in giving construc-
"tion thereto, are not at liberty to search for its meaning
"beyond the instrument.

"To get at the thought or meaning expressed in a stat-
"ute, a contract or a constitution, the first resort, in all
"cases, is to the natural signification of the words, in
"the order of grammatical arrangement in which the
"framers of the instrument have placed them. If the
"words convey a definite meaning which involves no ab-
"surdity, nor any contradiction of other parts of the
"instrument, then that meaning, apparent on the face
"of the instrument, must be accepted, and neither the
"courts nor the Legislature have the right to add to it
"or take from it. *Newell* v. *People*, 7 N. Y. 9, 97;
"*Hills* v. *Chicago*, 60 Illinois, 86; *Denn v. Reid*, 10 Pet.
"524; *Leonard* v. *Wiseman*, 31 Maryland, 201, 204,
"*People* v. *Potter*, 47 N. Y. 375; *Cooley, Const. Lim.*
"57; *Story on Const. Sec.* 400; *Beardstown* v. *Virginia*,
"76 Illinois, 34. So also, where a law is expressed in
"plain and unambiguous terms, whether those terms are
"general or limited, the Legislature should be intended
"to mean what they have plainly expressed, and
"consequently no room is left for construction. *United*
"*States* v. *Fisher*, 2 Cranch, 358, 399; *Doggett* v. *Flor-*
"*ida Railroad*, 99 U. S. 72."

In *Yerke* v. *United States* (173 U. S. 439, 442), this Court said, *per* Mr. Justice McKenna: "The rule is "elemental, that language which is clear needs no con-
"struction."

In *United States* v. *Philbrick* (120 U. S. 52), in construing a statute, great force was given to the fact that the executive department, upon whose officers had been imposed the duty of executing the statute, had placed a particular construction upon it. In the opinion of the

Court, delivered by Mr. Justice Harlan, there is this language (p. 59):

"A contemporaneous construction by the officers upon "whom was imposed the duty of executing those stat- "utes is entitled to great weight, and since it is not clear "that that construction was erroneous, it ought not now "to be overturned. See *Hahn* v. *United States,* 107 "U. S. 405, and *Brown* v. *United States,* 113 U. S. 571, "and authorities cited in each case."

In *United States* v. *Hill,* 120 U. S. 169, there is this language used by Mr. Justice Blatchford, in giving the opinion of the Court:

"In *Edwards' Lessee* v. *Darby,* 12 Wheat. 206, 210, "it was said: 'In the construction of a doubtful and " 'ambiguous law, the contemporaneous construction of " 'those who were called upon to act under the law, and " 'were appointed to carry its provisions into effect, is " 'entitled to very great respect.' To the same effect are "*United States* v. *Dickson,,* 15 Pet. 141, 145; *United* "*States* v. *Gilmore,* 8 Wall. 330; *Smythe* v. *Fiske,* 23 "Wall. 374, 382; *United States* v. *Moore,* 95 U. S. 760, "763; *United States v. Pugh,* 99 U. S. 265, 269; *Hahn* "v. *United States,* 107 U. S. 402, 406; and *Five per* "*cent Cases,* 110 U. S. 471, 485. In the case of *Brown* "v. *United States,* 113 U. S. 568, the same doctrine was "applied, the cases in this Court on the subject being "collected, and it being said that a 'contemporane- "ous and uniform interpretation,' by executive "officers charged with the duty of acting under "a statute, 'is entitled to weight' in its construction, 'and " 'in a case of doubt ought to turn the scale.' A still "more recent case on the subject is *United States* v. *Phil-* "*brick, ante,* 52, where this language is used: 'A con- " 'temporaneous construction by the officers upon whom " 'was imposed the duty of executing those statutes is " 'entitled to great weight; and since it is not clear that

" 'that construction was erroneous, it ought not now to " 'be overturned.' "

In connection with the two cases last cited, the Court should take into consideration that the executive departments placed a practical construction upon the statute in question, immediately after it became a law, and when it may not be surmised or conjectured that there was any reason why the executive departments, aided by the law department, should not attempt to construe the law exactly as it was understood to have been enacted by the Congress. To undertake to spell out a different construction than was then put upon it by the intelligent officers charged with its execution, in order that by reason of a strained construction, contrary to the meaning of the language used, and contrary to all grammatical and rhetorical construction of language, an unintended statute may be evolved that will be consistent with the provisions of the constitution, is unreasonable, and abhorrent to all the principles which govern this Court in its administration of justice.

CHARLES E. PATTERSON,
*Of Counsel.*